

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

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PHILLIPS-VAN HEUSEN CORP.,

Plaintiff,

- against -

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MITSUI O.S.K. LINES LTD.;  
DAMPSKIBSSELSKABET AF 1912  
AKTIESELSKAB and AKTIESELSKABET  
DAMPSKIBSSELSKABET SVENDBORG,  
Defendants/Third Party Plaintiffs,

- against -

KELLAWAY TRANSPORTATION, INC.;  
KELLAWAY INTERMODAL & DISTRIBUTION  
SYSTEMS, KELLAWAY INTERMODAL  
SERVICES, INC. and KELLAWAY TERMINAL  
SERVICES, INC.,

Third Party Defendants.  
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2 to CV  
Civil Action No.: 1: CV-00-0665  
(Hon. Sylvia H. Rambo)

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10-3-02  
MAY  
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HARRISBURG, PA  
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**DAADS t/a MAERSK LINE'S REPLY TO KELLAWAY'S MEMORANDUM  
IN OPPOSITION TO PETITION FOR ATTORNEYS' FEES**

Defendant and Third-Party Plaintiff DAADS t/a Maersk Line ("Maersk Line") by and through its undersigned attorneys, Palmer Biezup & Henderson LLP, submit the following reply to Kellaway's opposition to Maersk Line's Petition for Attorneys' Fees.

**I. Kellaway's Opposition Ignores the Court's Finding That The UIIA Applies And The UIIA Requires Kellaway to Indemnify Maersk**

Kellaway's main argument in its opposition (Section "A") ignores the Court's ruling that the UIIA applies to Maersk Line's indemnity claim and said agreement requires Kellaway to

indemnify Maersk. Section "A" of Kellaway's opposition is simply a re-argument concerning the applicability of the UIIA, an issue already decided at the trial.

This Honorable Court in its Memorandum Findings of Fact and Conclusions of Law dated August 14, 2002 held that Kellaway was bound by the terms of the Uniform Intermodal Interchange Agreement ("UIIA") at all times material to this case and that pursuant to the terms of the UIIA Kellaway must indemnify Maersk Line. The Court stated:

"The Court has previously found that Kellaway's failure to install additional safety measures constituted negligence. Therefore, the UIIA requires Kellaway to indemnify [Maersk Line] for the amount it will have to pay PVH for the loss of the cargo."  
(Decision, Page 28)

In these circumstances, Kellaway's argument that the UIIA is somehow not applicable must be stricken. The Court's application of the UIIA is law of the case and is binding on Kellaway on the issue of attorneys' fees.

The UIIA clearly requires Kellaway to indemnify Maersk Line for its attorneys' fees and expenses incurred in defending plaintiff's claims. The UIIA provides at Part III Section 7(d)-(e)

- d. Indemnity: Motor Carrier agrees to defend, hold harmless, and fully indemnify [Maersk], Equipment Owner, and/or Facility Operator, as their interests appear, against any and all loss, damage or liability, including reasonable attorneys fees and costs incurred in the enforcement of this Agreement, suffered by [Maersk], Equipment Owner and/or Facility Operator arising out of Motor Carrier's negligent or intentional acts or omissions during an Interchange Period and/or presence on Facility Operator's premises.

- e. Motor Carrier shall provide legal defense to [Maersk], Equipment Owner and/or Facility Operator for any claim arising against Motor Carrier under Section III.7.d.

## **II     The Terms of the UIIA Require Kellaway to Indemnify Maersk Line For Attorneys Fees and Costs Incurred in Enforcing the Terms of the UIIA**

The UIIA clearly requires Kellaway to indemnify Maersk Line for all attorneys' fees and expenses incurred in enforcing the terms of the UIIA. The UIIA at Part III, Section 7(d) clearly indicates that indemnity includes "reasonable attorneys fees and costs incurred in the enforcement of this Agreement. . ."

Kellaway, in Section "B" of its opposition, again ignores the Court's ruling that the terms of the UIIA apply and require Kellaway to indemnify Maersk. The terms of the UIIA clearly allow the recovery of attorneys fees and expenses incurred in seeking to enforce the terms of the agreement. The cases cited by Kellaway in Section "B" of its opposition are inapposite from the situation before the Court. None of the cases cited by Kellaway involved a specific contract provision requiring full indemnification for attorneys fees and expenses incurred in seeking to enforce the terms of the agreement. Moreover, it was Kellaway who forced Maersk Line to take legal action to enforce the terms of the UIIA when it rejected Maersk Line's tender of the defense of plaintiff's claim and "refused to defend the case on their behalf." Court's Decision, Page 8.

Attorney fees incurred in enforcing contractual terms are clearly recoverable when the contract specifically provides for the recovery of attorneys' fees. See: Crowley American Transport, Inc. v. Richard Sewing Machine Co., 172 F. 2d 781 (11<sup>th</sup> Cir. 1999) (attorneys' fees incurred to enforce terms of bill of lading awarded pursuant to terms in ocean carrier's bill of

lading); Maersk v. Alan Marketing, 1999 AMC 278 (S.D.N.Y. 1998) (attorney fees incurred in collecting freight payments awarded pursuant to the terms of the bill of lading). Similar to the above-cited cases, the case before the Court involves specific contractual provisions calling for the award of attorneys' fees and costs in enforcing the UIIA contract.

On Page 8 of its opposition, Kellaway mistakenly argues that Maersk did not incur attorneys' fees and expenses defending plaintiff claims. The trial record clearly shows that it was Maersk that took the lead in cross-examining plaintiff PVH's witnesses at trial. Moreover, it was Maersk, not Kellaway, who noticed and took the lead at the depositions of all PVH representatives. It makes sense that it was Kellaway who put on evidence about its own facility since such evidence was exclusively controlled by Kellaway.

### **III    The UIIA Required Kellaway to Provide Insurance Coverage For Maersk Which By Definition Includes Attorneys Fees and Costs**

The Court's ruling that Kellaway must indemnify Maersk Line under Section III.B.7d. of the UIIA makes it unnecessary at this time to reach the issue of Kellaway's failure to provide insurance. The Court ordered indemnification under the UIIA would include any and all liability Maersk might have to plaintiff as well as all attorneys' fees and expenses. The same items would be paid under the insurance policy tht should have been purchased by Kellaway on Maersk's behalf.

Kellaway's opposition fails to mention the Maersk Line Addendum to the UIIA Agreement which clearly required coverage for cargo loss and damage as well as other coverages. Although Kellaway admits that Maersk was named as an additional on a cargo

insurance policy, they mistakenly contend that the policy does not apply because Kellaway was "no longer hauling the cargo." (Opposition of Kellaway at Pages 9-10). This argument ignores the court's ruling that Kellaway as the motor carrier had not transferred physical possession of the container back to Maersk and therefore the loss took place during the interchange period. Moreover, neither Kellaway nor its insurer have produced or introduced into evidence a copy of any alleged insurance policy and, therefore, Kellaway cannot make arguments concerning what the policy terms and conditions might provide.

It is undisputed that the UIIA applies to this matter. In these circumstances, Kellaway was required to obtain insurance in favor of Maersk to cover all liabilities and defense costs arising out of the cargo loss which is the subject matter of this lawsuit.

#### **IV     Marsk Lines Attorneys' Fees Were Reasonable Under The Circumstances**

Kellaway's argument that Maersk Line's attorneys' fees were not reasonable is supported by mere conclusory statements by counsel. Much of the attorney time criticized by Kellaway was Kellaway's own doing. For example, it was Kellaway who produced the lease for the container yard in question showing that J.V.E. Company was the Owner of the container yard and suggested that it was J.V.E. Company who was responsible for the failed security. It was not until the deposition of a representative of J.V.E. was taken that the parties determined that it was Kellaway, and not J.V.E., who was responsible for the security. Research into the various Kellaway entities was necessary due to Kellaway's name changes and the various documents issued by Kellaway with the different corporate names which appear in the caption of this

lawsuit. Kellaway's contention that the case was simple is belied by the comprehensive thirty-one page Memorandum Findings of Fact and Conclusions of Law issued by the Court, the volumes of trial exhibits, and the quite different positions taken by parties on the numerous issues of law. The January 25, 2002 entry in counsel for Maersk Line's invoice cited by Kellaway on Page 11 of its opposition was not for a 2.3 hour telephone call but, rather, the return trip from Harrisburg to Philadelphia after a January 25, 2002 Court conference. The research, deposition summaries and reporting by counsel for Maersk Line were all reasonable under the circumstances. Kellaway could have avoided liability under the UIIA for attorneys' fees had it accepted the tender defense made on July 17, 2000 prior to Maersk engaging counsel. (Maersk Trial Exhibit "N").

## **V      Conclusion**

Kellaway's opposition to Maersk's Petition for Attorneys' Fees and Expenses ignores the Court's ruling that the UIIA applies to Maersk Line's indemnity claim and Kellaway is required to indemnify Maersk Line. The application of the terms of the UIIA constitutes law of the case and, therefore, Kellaway must, in accordance with Part III, Section 7(d)-(e) of the UIIA fully indemnify Maersk Line for its attorneys' fees and expenses incurred in both defending plaintiff's claim and in seeking to enforce the UIIA.

Respectfully submitted,

PALMER BIEZUP & HENDERSON LLP

By: Richard Q. Whelan : wes

Richard Q. Whelan (ID #35688)  
Attorney for DAADS t/a Maersk Line  
956 Public Ledger Building  
620 Chestnut Street  
Philadelphia, PA 19106-3409  
(215) 625-9900

Dated:

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that service of a true and correct copy of Defendant/Third-Party Plaintiff DAADS t/a Maersk Line's Reply to Kellaway's Memorandum in Opposition to Petition for Attorneys' Fees was made to the below-listed counsel via Hand Delivery or Federal Express Courier on the date appearing below.

George R. Zacharkow, Esquire  
Mattioni Ltd.  
399 Market Street, 2<sup>nd</sup> Floor  
Philadelphia, PA 19106

Carl H. Delacato, Esquire  
Hecker, Brown, Sherry & Johnson  
1700 Two Logan Square  
18<sup>th</sup> & Arch Streets  
Philadelphia, PA 19103

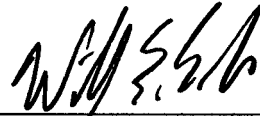
Ann-Michele G. Higgins, Esquire  
Rawle & Henderson LLP  
The Widener Building  
One South Penn Square  
Philadelphia, PA 19107

Patrick J. Keenan, Esquire  
Duffy & Keenan  
The Curtis Center, Suite 1150  
Independence Square West  
Philadelphia, PA 19106

Douglas B. Marcello, Esquire  
Thomas, Thomas & Hafer  
305 North Front Street  
P.O. Box 999  
Harrisburg, PA 17108

PALMER BIEZUP & HENDERSON LLP

By: \_\_\_\_\_



William E. Ecenbarger  
Attorney for DAADS t/a Maersk Line  
620 Chestnut Street  
956 Public Ledger Building  
Philadelphia, PA 19106-3409  
(215) 625-9900

October 3, 2002